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Bay Area Air District:



August 10, 2021

Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel
United States Environmental Protection Agency
Washington, D.C. 20460

Re: EPA Complaint No. 01R-21-R9

Dear Ms. Dorka:

This letter provides the response of the Bay Area Air Quality Management District (the "Air District"), in accordance with 40 C.F.R. § 7.115(d), to the U.S. Environmental Protection Agency (EPA) External Civil Rights Compliance Office's (ECRCO) June 21, 2021, Preliminary Findings Letter ("Findings Letter") pertaining to the above-referenced Complaint.

The Air District believes its programs satisfy applicable requirements of federal civil rights laws, including Title VI and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7. While, for the reasons explained below, we respectfully disagree that our programs have fallen short of applicable legal obligations, we acknowledge that the Findings Letter sets forth constructive suggestions for improvement. The Air District is committed to improving its nondiscrimination and accessibility programs and looks forward to working further with EPA to advance these goals.

EPA's current review takes place against the backdrop of a similar review conducted in 2016. EPA closed that review with a June 6, 2016 letter ("2016 Resolution Letter," attached). Based on the technical assistance provided by EPA in 2016 the Air District drafted its current Non-Discrimination and Accessibility Program and Grievance Procedures, translated those documents into target languages and a version accessible to persons with disabilities, and designated a Non-Discrimination Coordinator charged to implement the Air District's non-discrimination program. We refer to the Air District's implementation of the 2016 Resolution Letter as appropriate throughout this response.

Findings on the Notice of Nondiscrimination and Grievance Procedures

The Findings Letter cites as authority relevant to the District Notice of Nondiscrimination 40 C.F.R. sections 7.95 and 7.100. Section 7.95 states in relevant part:

(a) Requirements. A recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, age, or handicap in a program or activity receiving EPA assistance or, in programs or activities covered by section 13, on the basis of sex. Methods of notice must accommodate those with impaired vision or hearing. At a minimum, this notice must be posted in a prominent place in the recipient's offices or facilities. Methods of notice may also include publishing in newspapers and magazines, and placing notices in recipient's internal publications or on recipient's printed letterhead. Where appropriate, such notice must be in a language or languages other than English. The notice must identify the responsible employee designated in accordance with § 7.85.

Section 7.100 provides in relevant part "No . . . recipient . . . shall intimidate, threaten, coerce, or discriminate against any individual or group, either: [para.] (a) For the purpose of interfering with any right or privilege guaranteed by the Acts or this part, or [para.] (b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation."

In addition, as to grievance procedures, EPA cites 40 C.F.R. section 7.90 which requires "Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part."

1. The Findings Letter states that the Air District violates the Section 7.95(a) requirement to prominently post the Notice and the Grievance Procedures because neither is prominently displayed on the District website homepage.¹ However, neither that section nor Section 7.90, which requires the adoption of grievance procedures, require on their face that either document be on a recipient's homepage. More importantly, the Air District homepage does include a link entitled "Accessibility" which leads to the District Nondiscrimination Notice and Complaint Procedures, available in English, Spanish, Chinese,

¹ EPA also alleges the District's practices are not consistent with DOJ regulation 28 C.F.R. section 42.405, subdivision (c). However, 28 C.F.R. Part 42 governs federal agencies' implementation of Title VI programs; it does not govern recipients. (See Section 42.401, providing in part "[T]his subpart shall govern the respective obligations of federal agencies regarding enforcement of title VI.")

Vietnamese, and Tagalog. As a result, we respectfully disagree that the Air District's programs are legally deficient in this regard.²

2. The Findings Letter states that the Air District's Notice and Grievance Procedures must include a statement that the Air District does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights. However, neither section 7.90, 7.95, nor 7.100 contain any provision to require such a statement. The Air District's current procedures document was developed in close consultation with EPA in 2016. Although we believe our Notice and Grievance Procedures remain consistent with applicable requirements, the Air District will work with EPA to ensure an appropriate statement is explicit in our program documents.
3. The Findings Letter faults the Air District's discrimination complaint on the grounds that it must be downloaded from the Nondiscrimination Policy and Complaint Procedures page, filled out and mailed. When EPA accepted the Complaint, the link to the Air District's complaint form was broken.³ Once ECRCO brought this to the Air District's attention, the link was repaired. The District air pollution complaint portal is accessible by a link on the District homepage and allows a complaint to be submitted online.

The Notice, Grievance Procedures, and complaint form are all part of the package of documents the Air District developed in 2016 with close technical assistance from EPA. It appears EPA may have settled upon posting the notice and grievance procedures on a recipient homepage as a best practice sometime after it approved the District program in 2016. The Air District will work with EPA to determine how to implement current best practices.

² EPA's 2016 Resolution Letter notes that the District would post its Notice and its Complaint Procedures online, but makes no mention of where on the District website. It appears EPA may have settled upon posting the notice and grievance procedures on a recipient homepage as a best practice sometime after it approved the District Title VI notices in 2016.

³ The evidence suggests that the link in question was active when Complainant made his initial contact through the Air Quality Complaint Portal on June 24, 2020, because, on August 10, 2020, the Air District received a non-Title VI complaint erroneously submitted on the Title VI Complaint Form, demonstrating that the link was active soon after and, therefore, likely also at the time Complainant made his initial complaint.

4. The Findings Letter states that the Air District's policy and procedures do not ensure "prompt" resolution of complaint because they do not provide timeframes for completion of the investigation and an expected response time for the complainant.

The Air District respectfully disagrees with the factual basis for this preliminary finding. The Air District's Complaint Procedures state, "The staff review officer(s) will complete their review no later than 60 calendar days after the date the Air District received the complaint" This is the very provision the District developed in 2016 with ECRCO technical assistance. At page 5 of the 2016 Resolution Letter, ECRCO stated the Air District "adopted a grievance procedure that . . . provides complainants a prompt and impartial investigation of and response to complaints"

5. The Findings Letter states that neither the Nondiscrimination Policy nor the Complaint Procedures discuss or include retaliation/intimidation as one of the bases for filing a complaint, and that the Air District's Discrimination Complaint Form does not list any bases for filing a complaint under its procedures. The Findings Letter further states that the Form instead requests complainants write in what "protected class(es) of persons" they belong to, which places an unreasonable burden on members of the public to know what type of complaint of discrimination is actionable and what "protected class" they would fall under.

In fact, the Air District Complaint Form is more user-friendly than described. It requests filers to "Explain as clearly as possible what happened and why you believe discrimination has occurred with respect to a BAAQMD program or activity. Describe all persons who were involved. Include the name and contact information of the person(s) who discriminated against you (if known) as well as the names and contact information of any witnesses." This Form is part of the package of program documents developed in close collaboration with EPA in 2016. At that time, EPA ECRCO approved the District grievance procedure and stated at page 5 of the 2016 Resolution Letter that the Air District "grievance procedure . . . provides complainants a prompt and impartial investigation of and response to complaints" The Findings Letter cites no authority requiring a statement of non-retaliation or non-intimidation in a nondiscrimination policy or grievance procedure, nor prohibiting reference to "protected class," and we are aware of none. Regardless, the Air District will work with EPA to ensure retaliation/intimidation are adequately addressed.

Findings on the Nondiscrimination Coordinator

40 C.F.R. Section 7.85(g) requires that a recipient with at least fifteen employees, "shall designate at least one person to coordinate its efforts to comply with its obligations under this part." Section 7.95(a) further requires, "The notice must identify the responsible employee designated in accordance with § 7.85."

1. The Findings Letter states that the District Notice does not identify the Nondiscrimination Coordinator with enough specificity to enable a member of the public to contact that Coordinator. On June 4, 2021, the Air District updated its Notice to identify and provide contact for Mr. Chiladakis as Acting Nondiscrimination Coordinator. The Air District believes the Notice is now accurate and compliant.
2. The Findings Letter states that Complainant's June 24, 2020 air quality complaint contained a clear complaint of discrimination, that the Air District at no time acknowledged the civil rights complaint, and that the Complainant was not appropriately directed to the nondiscrimination complaint process or to the nondiscrimination coordinator. EPA cites this as evidence that the Air District's nondiscrimination grievance process is not fair, prompt, or accessible to the public.

Complainant's air pollution complaint did not articulate any specific act of discrimination against any protected class. Nonetheless, Air District management and staff contacted Complainant numerous times regarding the air pollution complaint. In addition to those contacts EPA describes in its Preliminary Findings Letter, Complainant also emailed Air District CEO/APCO Jack Broadbent and spoke with the Deputy APCO in charge of the Air District enforcement program. In all Complainant's numerous contacts and conversations with Air District staff and management regarding the dust complaint, he did not mention discrimination apart from his general and conclusory statement in the air pollution complaint note field.

The Air District is committed to ensuring that its nondiscrimination grievance process is fair, prompt, and accessible to the public. We will work with EPA to ensure these goals are met.

3. The Findings Letter states that although one of the duties of the Nondiscrimination Coordinator is to ensure that all employees who interact with the public are trained regarding nondiscrimination policies and procedures, it appears the Air District employees who handled the Complainant's June 24, 2020 air quality complaint with the Air District

had not received such training. On June 4, 2021, the Air District updated its Air Quality complaint training manual and procedures to ensure that complaints of discrimination made to Air District enforcement staff are referred to the Air District Non-Discrimination Coordinator. The Air District will work with EPA to ensure an appropriate level of training amongst its public-facing staff.

Findings on Meaningful Access for Persons with Limited English Proficiency (LEP)

42 U.S.C. section 2000d provides that “No person in the United States shall, on the ground of . . . national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 40 C.F.R. section 7.35(a) prohibits such discrimination in a program receiving EPA financial assistance. The Findings Letter cites *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) for the proposition that appropriate language services are required to avoid discrimination based on national origin. The Findings Letter states that the Air District agreed to follow EPA’s “Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (39 FR 35602, &s., “LEP Guidance”).

1. The Findings Letter states that the Air District website is in English and relies on Google Translate, and provides only vague and limited language assistance information that is accessible to persons with LEP only through use of a search the Google Translate function.
2. The Findings Letter states that the telephone number the District provides for language assistance is stated in Spanish, but information for accessing language services in other languages is printed in English. The number provided goes to a pre-recorded message in English only, without any option for accessing information in any other language.
3. The Findings Letter states that the District 2010 report titled “Assessment of Limited English Proficient Populations and Current Services - Bay Area Air Quality Management District,” which contains information about the demographics and languages spoken by persons with LEP in the District, requires reassessment and update.
4. The Findings Letter states that the Air District is not using the services of a qualified translator to translate its “vital documents” into the appropriate languages, and no vital documents translated through the

services of qualified translators appear to be posted online, including reports pertaining to public participation and accessibility.

The Air District believes it is in compliance with its obligations to provide access to persons with LEP. We believe the analysis reflected in the Air District Public Participation Plan and its "Assessment of Limited English Proficient Populations and Current Services - Bay Area Air Quality Management District" is in accordance with that set out in EPA's LEP Guidance (39 FR 35606). The District translated its Non-Discrimination Policy and Complaint Procedures into target languages as provided in the 2016 Resolution Letter. The Procedures remain available in hard copy and on our website, accessible through a link on the District homepage. The Air District will work with EPA to clarify these circumstances and to ensure its LEP accessibility efforts are appropriate and effective.

Findings on Accessibility for Individuals with Disabilities

The Findings Letter notes that EPA's nondiscrimination regulation provides that no individual with a disability "shall solely on the basis of [disability] be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance." (40 C.F.R. § 7.45.) Citing 40 C.F.R. § 7.65 (b) and (d), the Findings Letter further states that recipients must ensure that those with impaired vision or hearing can find out about the existence and location of program services, activities, and facilities that are accessible to and usable by persons with disabilities and that recipients must give priority to methods of providing accessibility that offer program benefits to persons with disabilities in the most integrated setting appropriate.

The Findings Letter describes as "a recognized best practice" having a written plan, such as EPA's sample disability nondiscrimination plan, to ensure access for individuals with disabilities and to describe how the recipient will provide appropriate auxiliary aids and services at no cost.

1. The Findings Letter states that the Air District's Disability Policy has been combined with its Notice of Nondiscrimination, is very limited in the information it provides, and does not make clear that auxiliary aids and services are available free of charge.
2. The Findings Letter states that the Notice to be deficient because it does not make any explicit reference to ensuring that facilities and in-person meetings will be made or selected based on their accessibility to individuals with physical disabilities.

3. The Findings Letter states that neither the Air District's accessibility statement, nor its grievance procedures provide clear and consistent instructions for persons with disabilities on how to seek reasonable accommodations to meaningfully participate in Air District programs, services and activities and/or to file a grievance for discrimination on the basis of disability.

The Air District respectfully disagrees that its efforts to provide access to persons with disabilities, which were developed in close consultation with EPA, fall short of applicable requirements. First, we note that none of the authorities EPA cites specify that a recipient must state that services to accommodate a disability are free of charge; that meeting facilities will be chosen based on accessibility; or that recipients must adopt a plan and procedures such as EPA's sample plan. In the 2016 Resolution Letter, EPA stated, "The Non-Discrimination Policy not only provides notice that the Air District does not discriminate . . . , but provides notice of services available for those with disabilities" and information "regarding access for those with disabilities." (Resolution Letter, pages 5 and 6.)

Findings on Public Participation

Regarding public participation, the Findings Letter references 40 C.F.R. sections 7.45 and 7.65, subdivisions (b) and (d), discussed above; and section 7.145, which prohibits age discrimination.

1. The Findings Letter states that the Air District's public participation policies are deficient regarding access for persons with limited English proficiency and persons with disabilities. For the reasons set forth above regarding LEP and disabilities, the Air District does not agree. However, the Air District will to work with EPA to ensure its programs are appropriate and effective.
2. EPA states that in 2016, it noted that the Air District's its Public Participation Plan does not mention any procedures addressing accessibility for individuals with disabilities. EPA further states that the Air District's "accessibility" language in its Notice of Nondiscrimination is not an appropriate substitute for including explicit disability language in its Public Participation Plan, and the language on accessibility and accommodations in its Notice of Nondiscrimination document are lacking.

The Air District believes the Findings Letter is incorrect. We note that when EPA last reviewed the District Title VI program, EPA expressed satisfaction that with the accessibility provisions of the District Notice. Specifically, in its 2016 Resolution Letter, EPA stated, "The Non-

Discrimination Policy not only provides notice that the Air District does not discriminate . . . , but provides notice of services available for those with disabilities.” (Page 5.) The Air District will work with EPA to ensure accessibility for persons with disabilities is adequately addressed.

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The Air District looks forward to working cooperatively with EPA to further our shared nondiscrimination goals. We will soon reach out to EPA representatives to address any issues unresolved by this response. In the mean time, please feel free to contact Acting District Counsel Adan Schwartz at (415) 749-5077 or aschwartz@baaqmd.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Jack P. Broadbent". The signature is fluid and cursive, with the first name "Jack" being more prominent.

Jack P. Broadbent
Executive Officer/APCO

Attachment: 2016 Resolution Letter from EPA